

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-211761**DATE:** November 21, 1983**MATTER OF:** Israel Military Industries**DIGEST:**

GAO will not review agency determination not to waive Buy American Act requirements since Buy American Act vests discretion as to waiver in heads of concerned agencies.

Israel Military Industries (IMI), an Israeli firm, protests award of a contract by the Navy Ships Parts Control Center (Navy) to Pyrotechnic Specialties, Inc., under request for proposals (RFP) No. N00104-82-R-WW97. IMI contends that its offer represented the lowest price to the government and, therefore, it should have been awarded the contract. Instead, IMI contends that the Navy improperly added a 50-percent evaluation factor to its offered price pursuant to the Buy American Act, 41 U.S.C. § 10a, et seq. (Supp. IV, 1980), which made its evaluated price substantially higher than the price offered by the awardee. IMI argues that the Navy should have waived application of the Buy American differential. Alternatively, IMI argues that, pursuant to a Memorandum of Agreement (MOA) entered into between the government of Israel and the government of the United States, it was entitled to have its offer evaluated without application of the Buy American Act weighting factor.

We dismiss the protest.

The RFP, issued on September 28, 1982, called for propellant actuated cutters for use by the Navy's Explosive Ordnance Demolition swimmers. IMI's initial proposal was the lowest priced offer of the 12 offers received by the initial closing date. Since IMI is an Israeli firm which manufactures its product outside of the United States, the question arose as to whether IMI's offer was going to be evaluated under provisions of the Buy American Act, as implemented in

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Defense Acquisition Regulation (DAR) section VI (Defense Acquisition Circular No. 76-25, October 31, 1980).

Under the Buy American Act, supplies which have been manufactured in the United States are to be acquired by the United States government unless the head of the procuring agency determines it to be "inconsistent with the public interest" or "the cost to be unreasonable." 10 U.S.C. § 10a (1982). In accord with DAR § 6-104.4, an offer of goods from a "nonqualifying country" is to be evaluated by adding a 50-percent evaluation factor to its price. A "qualifying country" is defined in DAR § 6-001.5(a) as including a defense cooperation country which has an agreement with the United States for which the Secretary of Defense has made a determination and finding waiving the Buy American Act restrictions for specified items. In the case of IMI, an MOA was entered into between the United States Secretary of Defense and the Israeli Defense Minister on March 19, 1979. The MOA, set forth at DAR § 6-1504.1, states that it only applies to manufactured items which are listed in Annex "B" to the MOA and that for such manufactured items, no price differentials resulting from "Buy National laws and regulations" will be applied for evaluation of offers. The propellant actuated cutters which were the subject of this procurement were not listed on Annex "B" to the MOA at any time during the procurement process.

During the course of the procurement from RFP issuance on September 28, 1982, until award on May 5, 1983, IMI contacted the contracting activity requesting that the Navy initiate action to have the items added to Annex "B" and apprising the Navy of the protester's efforts to have the items listed.

The agency memorandum of the last contact, on April 5, 1983, which was after best and final offers, shows that IMI was informed that: (1) a preaward survey was being performed on the lowest priced domestic offeror; (2) no progress had been made on having the product listed on Annex "B" to the MOA; (3) IMI's offer would be evaluated under Buy American Act provisions and, unless IMI was successful in having the propellant actuated cutters listed before award was made, award would be made to the lowest priced, responsible domestic firm; and (4) the Navy had "taken no action to have the item waived of the provisions of the Buy American Act."

Since the propellant actuated cutters had not been added to Annex "B" to the MOA and the Buy American Act had not otherwise been waived by the Navy, IMI's offer was evaluated under the Buy American Act and displaced as the low offer. Therefore, on May 4, after a determination had been made that Pyrotechnic Industries, Inc., was responsible, award was made to that firm. On May 5, IMI's representative called the contracting activity and was informed of these actions. IMI filed its protest in our Office on May 11.

Basically, IMI argues that, with some assistance from Israeli officials, it made every attempt to have these propellant actuated cutters listed in Annex "B" to the MOA between the United States and Israel. IMI points out that cognizant Department of Defense officials had set out guidelines for having an item listed since the MOA itself sets forth no procedure. According to IMI, these guidelines indicate that first an attempt should be made to have the procuring agency waive the Buy American Act for the particular procurement. If no agency waiver is granted, a proposer in the competitive range may then apply to have the item listed in Annex "B." IMI contends that it did everything in its power to follow these guidelines, but was ultimately unsuccessful in getting a Navy waiver or an Annex "B" listing before award was made to a domestic firm. The Navy does not dispute IMI on this version of the facts. However, the Navy argues that IMI's protest is untimely because the information given IMI on April 5 gave the protester its basis for protest, which was not filed here until May 11, citing our Bid Protest Procedures (4 C.F.R. § 21.2(b)(2) (1983)).

Neither the Buy American Act nor the United States/Israeli MOA mandates that waiver be granted in any particular set of circumstances. Waiver of the Buy American Act requirements is possible where the procuring agency head determines that the purchase of the domestic supply items is inconsistent with the public interest or that the cost of the domestic supply items is unreasonable. 41 U.S.C. § 10a. Either a specific waiver for a particular procurement or a blanket waiver through the use of a memorandum of understanding--here, an MOA--involves balancing Buy American and apparently countervailing foreign policies. See General Motors of Canada Limited, B-212884, October 7, 1983, 83-2 CPD ____; E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD 533. The Buy American Act clearly vests within the agency head's discretion the decision whether to waive the act's requirements and the decision regarding waiver may be made

by appropriate Department of Defense officials under a memorandum of understanding in a proper exercise of the act's grant of discretion. Self-Powered Lighting, Ltd., 59 Comp. Gen. 198 (1980), 80-1 CPD 195; 51 Comp. Gen. 195 (1971). Since the discretion to waive the Buy American Act is vested in the agency heads by statute, our Office will not review the Department of Defense's determination not to waive the act's provisions for this procurement. See General Motors of Canada Limited, *supra*; Brown Boveri Corporation, 56 Comp. Gen. 596 (1977), 77-1 CPD 328. We note that, after consultation between Department of Defense officials and Department of the Navy officials, it was decided that the propellant actuated cutters should not be added to Annex "B" of the MOA for Fiscal Year 1983, but were appropriate for addition to Annex "B" for Fiscal Year 1984 procurements.

Accordingly, the protest is dismissed, and we need not discuss the agency contention regarding timeliness.

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